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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FREDDIE MENDOZA, Defendant and Appellant.	H045134 (Santa Clara County Super. Ct. Nos. C1648633, C1649941)

Pursuant to a plea agreement resolving two cases, defendant Freddie Mendoza pleaded no contest to five drug-related charges and admitted various enhancement allegations. In exchange, the prosecutor agreed to the dismissal of other enhancement allegations and to a nine-year split sentence, consisting of three years in local custody and six years of mandatory supervision, including one year in a residential treatment program. On appeal, defendant raises a number of challenges to his sentence, including that the trial court violated the plea agreement by sentencing him to three years and 69 days in county jail. We agree and reverse and remand with directions.

I. BACKGROUND

The record contains no facts as to the circumstances of defendant's offenses.

A felony complaint filed on October 13, 2016 in superior court case No. C1648633 charged defendant with possession of methamphetamine for sale (Health & Saf. Code, § 11378[1]; count 1) and possession of heroin for sale (§ 11351; count 2).

[1] All further statutory references are to the Health & Safety Code unless otherwise noted.

As to count 1, the complaint alleged that defendant possessed over 28.5 grams of methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)) and had previously been convicted of violating section 11378. The complaint further alleged that defendant had suffered three prior felony drug convictions (§ 11370.2, subd. (c)) and had served seven prior prison terms (Pen. Code, § 667.5, subd. (b)).

A second felony complaint filed on November 3, 2016 in superior court case No. C1649941 charged defendant with possession of heroin for sale (§ 11351, count 1); possession of methamphetamine for sale (§ 11378, count 2); and possession of a controlled substance, ketamine (§ 11350, subd. (a); count 3), a misdemeanor. As to count 2, the complaint alleged that defendant possessed over 28.5 grams of methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)). The complaint further alleged that defendant had suffered three prior felony drug convictions (§ 11370.2, subd. (c)); was out of custody on bail at the time he committed counts 1 and 2 (Pen. Code, § 12022.1); and had served seven prior prison terms (Pen. Code, § 667.5, subd. (b)).

On July 14, 2017, defendant pleaded no contest to all charges in both cases—that is, two counts of possession of methamphetamine for sale (§ 11378); two counts of possession of heroin for sale (§ 11351); and one count of possession of a controlled substance (§ 11350, subd. (a)), a misdemeanor. He admitted both allegations that he possessed over 28.5 grams of methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)); the out-of-custody-on-bail allegations (*id*., § 12022.1); and that he had served seven prior prison terms (*id*., § 667.5, subd. (b)). In exchange, the prosecutor agreed to the dismissal of the allegations in both cases that defendant had suffered prior felony drug convictions (§ 11370.2, subd. (c)). And the parties agreed to a nine-year "blended sentence," consisting of three years of in county jail and six years on mandatory supervision, including one year in a residential treatment program.

The trial court held a sentencing hearing on September 6, 2017. In case No. C1648633, the court imposed a total term of six years: the upper term of four years

on count 2; the upper term of three years on count 1, to run concurrently; and a consecutive two years on two of the seven prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). The court struck the additional punishment for the five other prior prison term enhancements under former Penal Code section 1385, subdivision (c)(1). The court awarded defendant a total of 552 days of credit in case No. C1648633. The court ordered that "after the completion of a 3 year sentence, the concluding portion of the total term imposed will be suspended, and you will be released on mandatory supervision . . . for a period of 3 years . . . ."

In case No. C1649941, the court imposed one year (one-third the middle term) on count 1, to run consecutively to the sentence in case No. C1648633; the middle term of two years on count 2, to run concurrently with the sentence in case No. C1648633; and a consecutive two years on two of the seven prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). The court struck the additional punishment for the five remaining prior prison term enhancements and the Penal Code section 12022.1 enhancements. The court awarded defendant a total of 69 days of credit in case No. C1649941. The court then stated: "After completion of 69 days, consecutive sentence to docket C1648633, the concluding portion of the total term imposed is suspended, and [defendant] will be released on mandatory supervision monitored by the probation department for 1,027 days . . . ."[2] The court imposed various fines and fees and then considered count 3, the possession of a controlled substance misdemeanor. After confirming that defendant had 69 days in credits, the court stated, "Credit for time served of 69 days. So your sentence is deem[ed] satisfied on Count 3."

[2] There are 1,095 days in three years (365*3). Subtracting 69 from that product yields 1,026. The court ordered defendant to be monitored on mandatory supervision for 1,027 days. Thus, it appears that the court intended to have defendant serve three years less 69 days on mandatory supervision but made a mathematical error.

The abstract of judgment states that defendant's total sentence is "9 years"; that, under Penal Code section 1170, subdivision (h)(5)(B), "3 years" are suspended and deemed a period of mandatory supervision; and "6 years" are to be "served forthwith." An attachment to the abstract of judgment sets forth the following "[o]ther order[]" as to case No. C1649941: "After completion of 69 days consecutive to C1648633, the concluding portion to total term imposed is suspended, 1,027 days, and defendant to do MS."

Defendant timely appealed.

II. DISCUSSION

A. The Trial Court Violated the Plea Agreement

Defendant contends the trial court violated the terms of his plea agreement by imposing a 69-day county jail sentence consecutive to the three years in county jail called for by the agreement. The Attorney General responds that while "the record of the sentencing hearing is somewhat unclear," the abstract of judgment shows that the trial court complied with the plea agreement by imposing a split sentence consisting of three years in jail followed by six years on mandatory supervision. The Attorney General also claims that the trial court deemed the entire jail term served "by virtue of appellant's extensive presentence credits that included the now-disputed 69 days."

1. Factual Background

We disagree with the Attorney General's characterization of the record. While it is true that the abstract of judgment calls for a nine-year, three-six split sentence, it also includes an attachment ordering defendant to complete "69 days [in case No. C1649941] consecutive to [the sentence in case No.] C1648633 . . ."[3] And the record does not

[3] As discussed further in part II.D. below, the Attorney General also fails to appreciate that the abstract of judgment erroneously provides for a six-year jail sentence and a three-year period of mandatory supervision, whereas the negotiated plea agreement called for a three-year jail sentence and a six-year period of mandatory supervision.

support the Attorney General's assertion that the trial court found that the three-year jail sentence had been satisfied by defendant's presentence credits. Instead, the court merely "deem[ed] satisfied" defendant's sentence "on Count 3" in case No. C1649941 based on the 69 days of credits.

We agree with defendant that the court sentenced him to three years and 69 days in county jail.[4] That reading of the record finds support in both the transcript of the sentencing hearing, at which the court ordered the "completion of 69 days, consecutive sentence to docket C1648633 . . . ," and the attachment to the abstract of judgment, which likewise ordered "completion of 69 days consecutive to C1648633 . . . ." Although the record contains ambiguities, it appears that the court tried (but failed) to comply with the agreed upon nine-year sentence by reducing the amount of time defendant was subject to mandatory supervision by 69 days.

2. Legal Principles

"A negotiated plea agreement is a form of contract . . . ." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) When a plea of guilty or no contest is entered in exchange for specified benefits, both the defendant and the prosecution are bound by the terms of the agreement. (*People v. Segura* (2008) 44 Cal.4th 921, 930-931.) Such compliance is required both as a matter of contract and by due process principles. (*People v. Silva* (2016) 247 Cal.App.4th 578, 587 (*Silva*).)

The trial court is free to accept or reject the parties' agreement. Where the court accepts the agreement, "[d]ue process requires . . . that the punishment imposed not significantly exceed that which the parties agreed upon." (*Silva*, *supra*, 247 Cal.App.4th at p. 587, fn. omitted.) A trial court "may withdraw its initial approval of the plea at the time of sentencing and decline to impose the agreed upon sentence, . . . [but] it must inform the defendant that he or she has the right to withdraw the plea and allow the

[4] At best, the abstract of judgment is internally inconsistent.

defendant to do so; it cannot merely alter the terms of the agreement by imposing punishment significantly greater than that originally bargained for." (*Ibid*.) The foregoing principle is codified in Penal Code section 1192.5, which provides in relevant part: "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

3. The Claim is Cognizable on Appeal

Defendant did not object at the time of sentencing that the sentence violated the plea agreement. "Whether or not a defendant waives an objection to punishment exceeding the terms of the bargain by the failure to raise the point in some fashion at sentencing depends upon whether the trial court followed the requirements of [Penal Code] section 1192.5. . . . [¶] Absent compliance with the [Penal Code] section 1192.5 procedure, the defendant's constitutional right to the benefit of his bargain is not waived by a mere failure to object at sentencing." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.)

As noted, Penal Code section 1192.5 requires the court to inform the defendant before he or she enters a plea that its approval of the plea agreement is not binding and if, after further consideration, it can no longer accept the plea, defendant has the right to withdraw it. Here, the trial court did not give those advisements orally at the time of the plea. However, the plea form defendant signed did include the following paragraph: "I understand that court is **not** bound by any agreement with the District Attorney, but if at sentencing the court no longer accepts the terms of the plea agreement, I will have the right to withdraw my plea . . . ." Defendant initialed beside that paragraph on his plea form.

This court has construed Penal Code section 1192.5 as requiring trial courts, upon withdrawing approval of a plea, to expressly give the defendant an opportunity to withdraw that plea. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362 (*Kim*) ["the statute plainly entitled the court below to withdraw its approval and deviate from the agreed terms so long as it offered defendant an opportunity to withdraw his plea"].) At sentencing, the trial court neither stated that it was withdrawing approval of the plea, nor expressly gave defendant an opportunity to withdraw his plea. Accordingly, the trial court failed to comply with Penal Code section 1192.5, such that defendant did not forfeit his claim by failing to object below.

Moreover, even assuming defendant forfeited his right to appellate review by failing to object, we would exercise our discretion to consider the issue on the merits because the Attorney General does not argue forfeiture and the sentencing transcript is sufficiently ambiguous that defense counsel reasonably may not have appreciated that the court had deviated from the agreement. (*People v. Smith* (2003) 31 Cal.4th 1207, 1215 ["an appellate court is generally not prohibited from reaching questions that have not been preserved for review by a party"].)

4. Analysis and Remedy

The court violated defendant's negotiated plea agreement, which provided for three years in county jail and six years on mandatory supervision, by sentencing defendant to three years and 69 days in county jail and six years less (approximately) 69 days on mandatory supervision. The punishment the court imposed significantly exceeded the punishment the parties agreed upon in that it required defendant to serve an additional 69 days in jail.

Having found error, we turn to the issue of remedy. "When an error of this type is established on appeal, relief may take any of three forms: a remand to provide the defendant the neglected opportunity to withdraw the plea; 'specific performance' of the agreement as made [citation]; or 'substantial specific performance,' meaning entry of a

judgment that, while deviating somewhat from the parties' agreement, does not impose a 'punishment significantly greater than that bargained for.' " (*Kim*, *supra*, 193 Cal.App.4th at p. 1362.)

Defendant requests that his sentence be modified to strike 69 days of jail time, a remedy he suggests would constitute specific performance of the plea agreement. Alternatively, he requests remand for resentencing or an opportunity to withdraw his plea. The Attorney General takes the position that this court has the authority under Penal Code section 1260 to "modify the sentence by striking the 69 days . . . ." Alternatively, he asserts that remand is appropriate if the record is unclear.

The sentencing transcript is confusing, and the abstract of judgment is potentially internally inconsistent. Given the confusion in the record, the most prudent course of action is to remand the matter to the trial court. Accordingly, we shall reverse and remand to the trial court with directions to either (1) resentence defendant in accordance with the parties' plea agreement or (2) withdraw its approval of that agreement and expressly offer defendant the opportunity to withdraw his plea. If defendant chooses to withdraw his plea, the matter shall proceed as if no plea had been entered. (*Kim*, *supra*, 193 Cal.App.4th at p. 1366.)

In light of this disposition, we need not resolve defendant's other challenges. However, we will address them briefly to provide guidance on remand where possible.

B. The Penalty Assessments on the Criminal Laboratory and Drug Program Fees

In case No. C1648633, the court imposed a $300 drug program fee (§ 11372.7, subd. (a)) plus $930 associated in penalty assessments and a $100 criminal laboratory analysis fee (§ 11372.5, subd. (a)) plus $310 associated in penalty assessments. Similarly, in case No. C1649941, the court imposed a $300 drug program fee plus $930 associated in penalty assessments and a $100 criminal laboratory analysis fee plus $310 associated in penalty assessments. Defendant contends the court erred in imposing

penalty assessments in connection with those fees, which he claims are nonpunitive fees upon which the imposition of penalty assessments is not authorized. Recent precedent from our Supreme Court compels us to reject that argument.

Penalty assessments, which are imposed under the Penal and Government Codes, mandate additional assessments upon every "fine, penalty, or forfeiture" imposed in a criminal case. (See, e.g., Pen. Code, § 1464, subd. (a)(1) ["[T]here shall be levied a state penalty in the amount of ten dollars ($10) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses"]; Gov. Code, § 76000, subd. (a)(1) ["[I]n each county there shall be levied an additional penalty in the amount of seven dollars ($7) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses"].) Penalty assessments can "increase the [underlying] fine by up to 310 percent." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 935.)

In 2016, the First Appellate District held that the criminal laboratory analysis fee is "not a fine, penalty, or forfeiture subject to penalty assessments." (*People v. Watts* (2016) 2 Cal.App.5th 223, 231 (*Watts*). *People v. Webb* (2017) 13 Cal.App.5th 486, 498-499 (*Webb*) extended *Watts* to the drug program fee. In *People v. Martinez* (2017) 15 Cal.App.5th 659, 669, the Fourth Appellate District followed suit. Defendant relies on *Watts* and *Martinez* in his opening brief.

After defendant filed his opening brief, our Supreme Court issued its decision in *People v. Ruiz* (2018) 4 Cal.5th 1100 (*Ruiz*). At issue there was whether, for purposes of the conspiracy statute (Pen. Code, § 182), the criminal laboratory analysis and drug program fees were "part of 'the punishment' 'provided for' [the offense of] . . . transporting a controlled substance in violation of section 11379, subdivision (a) . . . ." (*Id*. at p. 1107.) The court concluded that the criminal laboratory analysis and drug program fees are "punishment" for purposes of Penal Code section 182. (*Id.* at p. 1119.)

It expressly disapproved of *Martinez*, *Webb*, and *Watts* "to the extent they are inconsistent with our analysis and conclusion." (*Id*. at p. 1122, fn. 8.)

The *Ruiz* court declined to decide the precise issue defendant raises—whether the criminal laboratory analysis and drug program fees are subject to penalty assessments. (*Ruiz*, *supra*, 4 Cal.5th at p. 1122.) Nevertheless, *Ruiz* convinces us defendant's contention lacks merit. In particular, the court's disapproval of the cases on which defendant relies and its rejection of arguments similar to defendant's persuade us that defendant's challenge to the penalty assessments is meritless.

C. AIDS Education Fine

In case No. C1649941, the trial court ordered defendant to pay a $70 AIDS education program fine plus $217 in associated penalty assessments. Defendant now contends, and the Attorney General concedes, that the AIDS education program fine must be stricken because the statutory authority for its imposition has since been repealed, and that repeal applies retroactively to his nonfinal case.

Section 11350, subdivision (b) authorizes the imposition of "a fine not to exceed seventy dollars ($70)" on persons "who possesses any of the controlled substances specified in subdivision (a), . . . with proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code."[5] At the time of defendant's sentencing in September 2017, Penal Code section 1463.23 provided for the deposit of certain "fine[s] . . . in a special account in the county treasury which shall be used exclusively to pay for the reasonable costs of establishing and providing for the county, or any city within the county, an AIDS (acquired immune deficiency syndrome) education program under the direction of the county health department, in accordance with Chapter 2.71 (commencing with Section 1001.10) of Title 6, and for the costs of collecting and

[5] Defendant was convicted of possessing a controlled substance in violation of section 11350, subdivision (a). Therefore, the AIDS education program fine apparently was imposed pursuant to section 11350, subdivision (b).

administering funds received for purposes of this section." Penal Code section 1463.23 was repealed effective January 1, 2018. (Stats. 2017, ch. 537, § 18.)

Section 11350, subdivision (b) and other statutes that cross-reference Penal Code section 1463.23 were not repealed.[6] However, the parties agree that the AIDS education fine imposed under section 11350, subdivision (b) can no longer be imposed, given that the proceeds cannot be "used in accordance with Section 1463.23 of the Penal Code," as section 11350, subdivision (b) requires. While the parties do not use the phrase "implied repeal," we understand them to be taking the position that the repeal of Penal Code section 1463.23 implicitly repealed section 11350, subdivision (b).

Because defendant must be resentenced, we need not address the issue of implied repeal at this time. And we decline to provide any guidance to the court on remand because the parties' discussion of the matter is lacking. Specifically, they fail to address either the presumption against operation of the doctrine of implied repeal (*In re Thierry S.* (1977) 19 Cal.3d 727, 744) or the "[s]pecial rules of statutory interpretation govern[ing] how to apply a statute incorporating another statute that changes over time." (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 981 [citing *Palermo v. Stockton Theatres, Inc*. (1948) 32 Cal.2d 53, 58-59 for the rule that a statute that " 'adopts by specific reference the provisions of another statute . . . [incorporates] such provisions . . . in the form in which they exist at the time of the reference and not as subsequently modified' "].)

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[6] (See Bus. & Prof. Code, § 4338 ["In addition to any fine assessed under Section 4321, the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates Section 4140 or 4142, with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code"]; § 11377, subd. (b) ["The judge may assess a fine not to exceed seventy dollars ($70) against any person who violates subdivision (a), with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code"]; § 11550, subd. (d) ["In addition to any fine assessed under this section, the judge may assess a fine not to exceed seventy dollars ($70) against a person who violates this section, with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code"].)

D. The Abstract of Judgment Contains an Error

The abstract of judgment states that "[e]xecution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170, [subdivision] (h)(5)(B) . . . ." The abstract of judgment then specifies that the "*total sentence*" is nine years, the portion "[*s*]*uspended*" is three years, and the "*amount to be served forthwith*" is six years. Defendant contends that the abstract of judgment contains a clerical error because the suspended portion of his nine-year sentence was six years, not three years. The Attorney General argues that the abstract of judgment correctly reflects the fact that "the three-year bargained-for jail sentence was 'suspended' . . . because the court had found that part of the split sentence had been satisfied by appellant's presentence credits. Thus, appellant was to be released from jail 'forthwith' . . . to commence the second part of his split sentence . . . ." That argument is refuted by the record. As discussed above, the trial court did not find that the three-year jail sentence had been satisfied by defendant's presentence credits and order that he be released forthwith. Rather, the abstract of judgment "remanded [defendant] to the custody of the sheriff . . . forthwith . . . [t]o be delivered to . . . county jail." And the only portion of the sentence the court "deem[ed] satisfied" was defendant's sentence on count 3 in case No. C1649941.

A sentence to be served partly in county jail and partly under mandatory supervision is known as a "split sentence," and is imposed under Penal Code section 1170, subdivision (h)(5). (*People v. Camp* (2015) 233 Cal.App.4th 461, 464, fn. 1 ["A split sentence is a hybrid sentence in which a trial court suspends execution of a portion of the term and releases the defendant into the community under the mandatory supervision of the county probation department"].) That provision states, in relevant part: "[T]he court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion. [¶] (B) *The portion of a defendant's sentenced term that is suspended*

pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. . . ." (Pen. Code, § 1170, subd. (h)(5), italics added.)

The statute is clear: "The portion of a defendant's sentenced term that is *suspended . . . shall be known as mandatory supervision*." Therefore, the abstract of judgment should identify the period of mandatory supervision as the "portion suspended" and the portion of the sentence to be served in local custody as the "amount to be served forthwith."

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to either (1) resentence defendant in accordance with the parties' plea agreement or (2) withdraw its approval of that agreement and expressly offer defendant the opportunity to withdraw his plea. If defendant chooses to withdraw his plea, the matter shall proceed as if no plea had been entered. (*Kim*, *supra*, 193 Cal.App.4th at p. 1366.)

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ELIA, J.

WE CONCUR:

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GREENWOOD, P. J.

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GROVER, J.

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